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COURT OF APPEALS

STATE OF NEW YORK

JUAN VARGAS,

Respondent,

-against-

NO. 3

DEUTSCHE BANK NATIONAL TRUST COMPANY,

Appellant.

20 Eagle Street
Albany, New York
January 5, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 3, Vargas v. Deutsche
3 Bank.

4 MR. BRODERICK: Your Honor, it's asking me to
5 restart my video. I don't want to waste the court's time.
6 Could I appear by audio only?

7 CHIEF JUDGE DIFIORE: Certainly you may. If
8 you're comfortable with that, the court is comfortable with
9 that.

10 MR. BRODERICK: Yeah, I'm - - - I'm not much to
11 look at.

12 Your Honor, may it please the court, my name is
13 Patrick Broderick. I'm here for the defendant-appellant,
14 Deutsche Bank National Trust Company. And I'd like to
15 reserve two minutes for rebuttal.

16 CHIEF JUDGE DIFIORE: You may, Mr. Broderick.

17 MR. BRODERICK: This case deals with the
18 acceleration or alleged acceleration of a mortgage loan.
19 As has been discussed this afternoon, acceleration requires
20 clear and unequivocal notice of that acceleration to the
21 defaulting borrower. Here, the mortgage - - - here, the
22 letter that was sent to the borrower indicated that the
23 lender will accelerate your mortgage with the full amount
24 remaining, et cetera. And the First Department found that
25 the saying "will accelerate" is an acceleration.



1 We respectfully would submit that saying that a -
2 - - that an - - - an actor saying that they will take an
3 action is not the same as actually doing that action. We
4 also submit that looking backwards, in this case years
5 later, at a document saying an action will be taken, is not
6 proof that that action was taken.

7 In this case, the First Department, however,
8 found that a letter that said the mortgage loan will be
9 accelerated was the acceleration, and that the acceleration
10 took place on the thirty-third day after the date of the
11 letter.

12 JUDGE STEIN: Chief Judge, may I ask a question?

13 CHIEF JUDGE DIFIORE: Yes, Judge Stein.

14 JUDGE STEIN: Counsel, there's a - - - a lot of
15 focus on the word "will". Assume for the moment that
16 "will" - - - that that term itself is sufficiently
17 unequivocal. How - - - I guess I have a problem with that
18 letter, because I can't tell when the letter is saying that
19 - - - that it - - - that it would become effective. In
20 other words, it - - - it says that, you know, the
21 expiration of the cure period or commencement of a
22 foreclosure action. And it refers to "at that time". So
23 at which time?

24 Is it clear enough - - - is that a problem, as
25 well? That's - - - I guess that's my question.



1 MR. BRODERICK: Your Honor, we think that's a
2 gigantic problem, and that maybe the word "will" - - - I
3 don't think it's unequivocal, but it's certainly not clear.
4 And certainly the language at the end of that same sentence
5 saying "at that time"; at what time?

6 Is it at the time after the expiration of the
7 thirty-two days? Or is it at the time of the filing of the
8 foreclosure complaint? Or is it the time when the lender,
9 by some other means, elected to exercise its option to
10 accelerate?

11 JUDGE STEIN: Can I - - - can I just clarify one
12 other thing? There's - - - it's hard to tell from - - -
13 from your brief, but I just want to clarify whether - - -
14 are you saying - - - are you conceding for - - - for our
15 purposes here that - - - that there was standing to
16 commence the 2009 action and therefore that - - - that
17 would accelerate the debt? Or are you just saying that it
18 doesn't matter, because even if it was accelerated in that
19 action, it was subsequently revoked?

20 MR. BRODERICK: The latter. We hotly contested
21 whether or not the 2009 foreclosure case accelerated the
22 debt. And at the trial court level, what happened is after
23 the motion to renew, the trial court said, well, I'm not -
24 - - I don't have to get into this - - - whether the
25 foreclosure complaint was brought by the valid - - - by a



1 proper party, because I have a letter here. Under the
2 First Department jurisprudence, under the Royal Blue Realty
3 case, that letter accelerated the debt.

4 And so the trial court kind of didn't pass on
5 that issue. We would respectfully submit that that is an
6 issue that has not been determined by the lower courts. So
7 we are not stipulating that the 2009 foreclosure complaint
8 operated to accelerate the mortgage debt.

9 JUDGE STEIN: Thank you.

10 MR. BRODERICK: Looking at the letter, it's - - -
11 it's clear that a couple of things jump out in addition to
12 the "will" language. The "will" language is referring to
13 an affirmative act by the speaker. In other words, it says
14 "we", which is referring to the lender, "we will accelerate
15 your mortgage".

16 Well, that's a statement of future intention. In
17 other words, consistent with the Second Department's
18 decision in the Milone case, it's a future intention to
19 take an action. The action in this case would be to
20 accelerate the loan.

21 It even says "we will accelerate your mortgage",
22 not that it is accelerated, but we will accelerate your
23 mortgage at a future date. And as the Second Department
24 held in Milone, a future intention may always be changed in
25 the interim.



1 And we think that sentence is critical in this
2 case, because it's - - - it's demonstrably true. When you
3 say you will do something, it's not the same as actually
4 doing it. You can change your mind in the interim, or it
5 could become impossible for you to act in the - - - in the
6 interim.

7 What it's not doing is actually taking that
8 action. It's not automatically self-effectuating. And for
9 that reason, we think the Second Department holding in the
10 Milone case and the Adames case before Milone, we think are
11 the controlling cases on this issue.

12 Here we have a letter that does say we will
13 accelerate, but it does not say when. It does not say that
14 it is automatic. It does not provide an amount of that
15 acceleration.

16 From the point of view of the borrower, when you
17 owe someone money, the two most critical pieces of
18 information are number one, how much do you owe; and number
19 two, when do you owe it. Here, we don't - - - the
20 accelerated amount is not provided in this letter. In
21 addition, it says we will accelerate, but it does not - - -

22 JUDGE RIVERA: If I may ask a question, Judge?

23 CHIEF JUDGE DIFIIORE: Yes.

24 JUDGE RIVERA: Mr. Broderick, I mean, isn't the
25 point of the acceleration you owe everything on - - - I'm



1 calling in the debt?

2 MR. BRODERICK: That's right, that is the point
3 of acceleration.

4 JUDGE RIVERA: So - - - so I don't know that
5 that's really the issue. I take your point about the
6 possibility that the lender could change their mind, even
7 though as the letter is written, it has - - - it appears,
8 on its face, at least, to put this within the hands of the
9 debtor. You pay, we're not going to accelerate. You don't
10 - - - because now the default has been addressed. You
11 don't pay, we're going to accelerate.

12 But I take your point being that the lender
13 might, for whatever reason, even if there's not a payment
14 by whatever date is selected by the - - - by the lender or
15 under the law, as appropriate, that the lender might choose
16 not to accelerate. Is - - - is that sort of where you're
17 going with this argument?

18 MR. BRODERICK: That's exactly right. That the
19 acceleration will occur at a future date that has not been
20 determined and is not apparent from the face of this
21 letter.

22 JUDGE RIVERA: So then - - - so that your view, I
23 take it, is that as a result, you are encouraging - - -
24 through that understanding of the letter and the language,
25 it encourages the debtor and the lender to work it out. Am



1 I understanding you correctly? Because there's still hope,
2 from the debtor's perspective, that they could avoid this
3 acceleration?

4 MR. BRODERICK: That is exactly right, Your
5 Honor. We - - - we think that - - - that this language,
6 which is consistent with the mortgage contract, is also
7 consistent with public policy in that by not finding an
8 automatic acceleration, with language such as this, it
9 avoids a race to the courthouse by lenders. And in fact,
10 it avoids - - - it encourages the two sides to get
11 together.

12 And in fact, the second page of the letter
13 actually encourages the borrower to telephone in to loan
14 resolution to try to work this out.

15 And so rather than being a clear and unequivocal
16 acceleration of the debt, this is simply a letter that is
17 encouraging the two parties to work it out and that it's
18 complying and gives only the option to the lender to
19 accelerate in accordance with paragraph 22 of the mortgage.

20 Moving on - - -

21 CHIEF JUDGE DIFIIORE: Thank you, counsel. Thank
22 you, counsel.

23 Counsel?

24 MR. PANE: Good afternoon, Your Honors, may it
25 please the court. Justin Pane for respondent Juan Vargas.



1 Before getting into what I believe the court
2 would like to address, which is how to tackle this "will"
3 language, I just want to make clear, in Mr. Vargas' case,
4 Deutsche Bank itself admitted five times in the record that
5 the loan was, in fact, accelerated, as of January 16th,
6 2009, at the latest, and that the loan was still
7 accelerated, more than seven years later, in April of 2016.

8 So just to be clear, the record clearly
9 establishes that this loan was accelerated for a period of
10 seven years. So regardless of what statute of limitations
11 applied in the situation, by Deutsche's own admissions,
12 three of which being under oath by its attorneys - - - by
13 its own admissions, Mr. Vargas demonstrated his entitlement
14 to judgment as a matter of law.

15 Now, whether or not we go into now the "will
16 accelerate", which again, I look forward to making this
17 argument on why this was sufficient - - - but to be clear,
18 the facts of this case just - - - in a closed box here, Mr.
19 Vargas proves his burden, he established the loan was time
20 barred, and it was based off of Deutsche's very own
21 admissions.

22 Having said that, going into the "will
23 accelerate", well, the language - - - go ahead - - -

24 JUDGE STEIN: Doesn't that ignore any argument
25 about possible revocation in there, so - - - so that it



1 could have been - - - it could have theoretically been an
2 acceleration, a revocation, and then another acceleration?
3 So don't you have to talk about the revocation also?

4 MR. PANE: Only if the - - - Deutsche had argued
5 that it decelerated by revocation and then reaccelerated.
6 And nowhere in this record will the court find Deutsche
7 making the allegation that after it decelerated, it then
8 reaccelerated. It never makes that argument.

9 JUDGE STEIN: But - - - but - - -

10 MR. PANE: So I - - -

11 JUDGE STEIN: - - - isn't that the automatic
12 result of the action? If it was - - - if it was revoked
13 and then - - - then there's something that came afterwards,
14 isn't - - - isn't that just sort of an automatic
15 conclusion?

16 MR. PANE: No. I mean, this case is proof that
17 in the Engel and the Naidu cases that deceleration does not
18 auto - - - or I'm sorry - - - a discontinuance does not
19 automatically equate to deceleration, because this
20 particular case - - -

21 JUDGE STEIN: Okay, well, that's - - - then
22 that's the question of whether there's been revocation.
23 And that - - - that's the question that I'm trying to get
24 you to talk about a little bit.

25 MR. PANE: Okay. Revocation - - - I - - - I



1 don't believe there was, just because factually, the record
2 shows the loan was still accelerated after this revocation.
3 And again, the revocation, clearly from the circumstances,
4 shows that Deutsche had an ineffectual judgment. It
5 submitted falsely affirmed affidavits or affidavits it
6 could not confirm were true. And the trial court in the
7 2009 foreclosure action said, well, we're not going to
8 grant you a renewed judgment of foreclosure because you
9 submitted false affidavits in my court.

10 So in the discontinuance papers, Deutsche
11 admitted itself that the sole purpose of the discontinuance
12 was for the recommencement of foreclosure proceedings, to
13 pursue a valid judgment. But again, going back to that
14 discontinuance meaning revocation, automatically or
15 otherwise, this particular record proves that after the
16 discontinuance, and while no foreclosure action was pending
17 - - - that's an important point to make - - - is that the
18 record shows the loan was still accelerated as of April of
19 2016. And there's been no foreclosure action commenced
20 ever since 2009.

21 So this goes to - - -

22 JUDGE RIVERA: Judge, if I may ask - - - if I may
23 ask counsel?

24 CHIEF JUDGE DIFIORE: (Nodding yes).

25 JUDGE RIVERA: So counselor, if I'm understanding



1 your correctly, your argument here is if we agree, based on
2 the prior cases, with the Second Department's approach that
3 a - - - a discontinuance in and of itself, without - - - if
4 it's silent on the issue of deceleration, doesn't
5 decelerate, I assume you're saying you win. But if - - -
6 if it's an automatic - - - right, if it's an automatic
7 revocation, you're saying yes, but if they are able to make
8 a decision not to accelerate through their actions, through
9 an overt act, the overt acts exist here, because for the
10 entire period of time beyond the statute of limitations,
11 they were seeking to have Mr. Vargas pay the entire amount.
12 Am I getting your argument?

13 MR. PANE: If - - - I hope I'm answering your
14 question correctly, because there's - - - it was a little
15 bit long. But - - -

16 JUDGE RIVERA: I'm known for that. My apologies.

17 MR. PANE: Well, what - - - what Mr. Vargas is
18 positing here is that this case proves that deceleration in
19 and of itself is not automatically - - - I'm sorry - - -
20 revocation or discontinuance does not in and of itself
21 automatically decelerate, because this record shows that
22 even after a discontinuance, Deutsche was still treating
23 the loan as accelerated. And that's the record - - -

24 JUDGE RIVERA: Well, I - - - I think you're
25 arguing that even if we adopted such a rule, that it is



1 automatic, that in this case, the lender actually wasn't
2 seeking acceleration, but their intent was - - - excuse me,
3 deceleration. Their intent always was to continue
4 demanding the entire amount?

5 MR. PANE: Correct. And the record proves that
6 fact. So that would kind of go back to how it would be
7 tough to adopt such an argument, where, as one of the cases
8 before the court on the argument shows that it's not
9 automatic and that it couldn't be auto - - - because in
10 some cases it's - - - the lender chooses to keep the loan
11 accelerated.

12 So again, on the facts alone, this record shows
13 that the loan was accelerated for a seven-year period and
14 that it was not revoked.

15 Now, on the issue of "will accelerate", I believe
16 the letter sufficiently - - -

17 JUDGE RIVERA: But if I could follow up, then why
18 - - - why couldn't the court adopt a - - - a bright-line
19 rule that makes it easy in this way? The discontinuance is
20 an automatic revocation, but the debtor may rebut by
21 showing that indeed, on the facts of their case, the debtor
22 did continue to pursue the entire amount.

23 MR. PANE: I believe a bright-line rule would
24 make it extremely difficult, then, to ascertain any
25 specific accrual date. Because now you'd have to ascertain



1 - - - well, you give the lending institution an inference
2 that they were able to decelerate and that it was timely,
3 without establishing when they did accelerate. And then
4 you'd put it on the borrower to then establish that it was
5 on them, even though the lender has all the facts, to tell
6 the court when it was accelerated, that it wasn't
7 decelerated, and give particular dates which, again, as the
8 defendant's burden to prove statute of limitations is
9 expiring, I believe you've given the defendants an
10 unreachable goal.

11 I don't think anything - - - any defendant could
12 - - - could meet that standard, ever.

13 JUDGE WILSON: Chief, may I follow up on that for
14 a moment?

15 CHIEF JUDGE DIFIORE: Yes, Judge Wilson.

16 JUDGE WILSON: So counsel, suppose the rule
17 instead, was an automatic deceleration upon discontinuance,
18 but the next time the lender sends something saying I want
19 the whole amount, that then, is an acceleration by letter?
20 Doesn't that give you that clear rule about when the
21 reacceleration started?

22 MR. PANE: I'm not sure that it does. And I
23 think this kind of piggybacks off the question you had
24 asked the last case regarding the general rule, where you
25 had a tough time saying if a lender elects to accelerate



1 that - - - or I'm sorry - - - doesn't choose to exercise
2 their election to accelerate, are we to say that the cause
3 of action just accrues against them even if they don't
4 elect it?

5 Am - - - am I correct in saying that's a
6 piggyback off the question you'd asked the last question -
7 - - in the last case?

8 JUDGE WILSON: I don't view it that way. But
9 that doesn't mean - - -

10 MR. PANE: Oh, okay.

11 JUDGE WILSON: - - - you didn't.

12 MR. PANE: Again, I just - - - so I wanted to
13 make sure that I'm answering your question specifically.
14 But I believe that if your question is that the - - -

15 JUDGE WILSON: Would it help you if I tried my
16 question again?

17 MR. PANE: It would be wonderful. Thank you.

18 JUDGE WILSON: Sure. So let's suppose that we
19 adopt a rule that says a discontinuance - - - voluntary and
20 not on the merits - - - discontinuance of the action,
21 automatically causes a revocation of the acceleration.
22 That's a hard bright-line rule. But we also say you can,
23 if you're the lender, accelerate a loan by starting an
24 action, but you can also accelerate it by sending the
25 borrower notice that you are accelerating the loan, that



1 you have accelerated it - - - not - - - maybe not that "you
2 will", but that you have.

3 And if the lender sends something, say, after the
4 decel - - - the automatic deceleration, sends something
5 saying you owe us the full amount, that is - - - then
6 starts the acceleration again. Can we have that kind of
7 rule, and wouldn't that be - - - wouldn't that take care of
8 the lack of clarity issue you raised in answering Judge
9 Rivera?

10 MR. PANE: I'm not sure that it would, because if
11 you have this voluntary discontinuance acting as automatic
12 revocation, well, then you're saying that if the election
13 was made in the complaint, okay, I can understand how it
14 makes sense; but if the election to accelerate was made
15 prior to the complaint, now you're saying that the de - - -
16 the deceleration or the discontinuance vitiates any prior
17 act of acceleration, regardless of whether it was through
18 the commencement of foreclosure or by notice earlier on.

19 So you're - - - you're now opening this Pandora's
20 box to how far on a continuum of time this can go. But
21 let's just go with that thought. Let's say, okay, you
22 know, a - - - the discontinuance is automatic and then a
23 lender can send a letter saying they're reaccelerating.
24 They absolutely can reaccelerate the loan, because it's on
25 the defendant to raise a statute of limitations defense.



1 I mean, it's a waivable defense. So a lender can
2 seek an accelerated - - - you know, a balance, you know,
3 fifteen years in the future. If the defendant doesn't
4 raise the defense, they get the fifteen years' worth of
5 payments.

6 So it's on the defendant to - - - to raise the
7 defense, but I'm not sure, I guess, I understood the - - -
8 the automatic revocation then leading to a reacceleration
9 by letter. I mean, the - - - again, I think the letter is
10 an easier way to fix a statute of limitations period or
11 accrual, and this is - - - this is what I guess I was
12 trying to address in your last question, is that the lender
13 does not have to send - - - under a Form 3033 Fannie Mae
14 mortgage, does not have to send a notice of acceleration.

15 If a borrower misses a payment, a lender could
16 start a foreclosure action over one payment. You know, New
17 York RPAPL provides for partial foreclosure actions. So if
18 they wanted to, they could foreclose on a single payment,
19 two payments, three payments.

20 But if they want to elect that special rule where
21 they can say, you know what, this loan is mature now, I'm
22 maturing this loan, due and payable in full, they have to
23 send out this condition precedent, notice of acceleration.

24 And in this particular case, rather than use what
25 the mortgage said you're supposed to use if you're a lender



1 - - - it says you have to send, under paragraph 16 - - -
2 16(c) and 22(b) (4) that if I do not correct the default by
3 the date stated in the notice, lender may require immediate
4 payment in full.

5 In this case, IndyMac chose not to use the
6 language in the mortgage, because the borrower and IndyMac
7 agreed that the language would be "may accelerate". It
8 chose to supplant that with the word "will". So again, we
9 have to give effect to the meaning of the - - - the
10 negotiation made between the borrower and the mortgage bank
11 in making this contract, is that they both agree that "may"
12 would be the operative word to say we don't have to elect
13 it. We're just going to, maybe in the future, and that
14 would be equivocal - - - and I agree - - - may accelerate
15 would be not sufficient.

16 By choosing - - -

17 CHIEF JUDGE DIFIORE: Thank you - - -

18 MR. PANE: - - - "will" over "may" - - -

19 CHIEF JUDGE DIFIORE: Thank you, Mr. Pane.

20 Mr. Broderick - - -

21 MR. PANE: Thank you, Your Honor.

22 CHIEF JUDGE DIFIORE: - - - we're assuming that
23 you've maintained - - -

24 You're welcome.

25 We're assuming you've maintained your connection?



1 MR. BRODERICK: Yes, Your Honor. Can you hear
2 me?

3 CHIEF JUDGE DIFIORE: Yes, we can. Thank you.

4 MR. BRODERICK: Thank you, Judge. Just briefly,
5 I just want to speak about the - - - the alleged evidence
6 that subsequent correspondence on the record here somehow
7 evidences acceleration from the - - - by the August 2008
8 letter.

9 There's two letters in the record that I think
10 counsel was referring to. The first letter was sent by a
11 law firm during the pendency of the foreclosure case. That
12 letter is, you know, on the record at page 37.

13 It's during the pendency of the foreclosure case
14 when foreclosure counsel was under the mistaken belief that
15 there was a foreclosure pending, number one. And number
16 two, that - - - that a valid foreclosure was pending, I
17 should say. Number two, it does not refer to the word
18 "acceleration". It says nowhere in it accel - - - that
19 there's an accelerated amount. And it nowhere refers to
20 the August 2008 letter, which is the one we're talking
21 about, at issue in this case.

22 So we don't think that letter in September 2013
23 evidences anything with respect to acceleration.

24 The second letter in the record is after the
25 foreclosure case was dismissed. That's at the record at



1 page 39. That's a payoff letter. Payoff letters have
2 nothing to do with acceleration of loans.

3 Loans that are current, people can and do ask for
4 payoffs if they want to refinance, if they're selling the
5 home, et cetera. A payoff quote has nothing to do with
6 acceleration. The letter itself that's being referred to
7 in July of 2014, never mentions acceleration and certainly
8 never mentions the letter from six years prior saying that
9 that was the acceleration.

10 So we don't think the record subsequent to the
11 sending of the letter in August of 2008 - - - we don't
12 think the record bears out the argument that the loan was,
13 in fact, was accelerated by that August 2008 letter.

14 JUDGE FAHEY: Judge? Could I ask a question?

15 CHIEF JUDGE DIFIORE: Yes, Judge Fahey.

16 JUDGE FAHEY: Mr. Broderick, what would you have
17 us look at in the record - - - what would you point to,
18 what piece of proof would you point to, that you would say
19 this letter constituted a deceleration of the loan? What
20 in the record?

21 MR. BRODERICK: We would refer to the - - - well,
22 we'd start by saying we don't think this loan was ever
23 accelerated.

24 JUDGE FAHEY: Okay, I got that. But let's assume
25 it was accelerated, what would you point us to to say it



1 was decelerated?

2 MR. BRODERICK: We would point to the motion to
3 discontinue the action.

4 JUDGE FAHEY: Thank you.

5 CHIEF JUDGE DIFIORE: Thank you, counsel.

6 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Juan Vargas v. Deutsche Bank National Trust Company, No. 3 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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Date: January 12, 2021

